



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CASE NO. 3132 OF 2000

BETWEEN:

ESTER MWITHA.....PLAINTIFF

and

M. PURMESSUR.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mhone of Counsel for the Plaintiff
Msiska of Counsel for the Defendant
Mrs. Chingana Official Interpret

Kapanda, J.

Ruling



Introduction

By way of a writ of summons issued on 2nd October 2000 the Plaintiff commenced an action against the Defendant. In the action so initiated the Plaintiff is claiming for an injunction to restrain the Defendant from occupying and blocking entrance to the Plaintiff's house known as title No. NY423-Nyambadwe and costs of the law suit. On the very same day the action was commenced the Plaintiff took out an ex-parte summons for an

order of an interlocutory injunction against the Defendant under Order 29 of the Rules of The Supreme Court.

My brother Judge, Chipeta, J, granted an interim order of injunction up to the 6th of October 2000 when an inter partes application was to be heard. It is not known, from the record, as to what transpired on the 6th of October 2000 but it is manifestly clear that no such inter partes application was heard on the appointed day for the hearing of the said inter partes application. However, the inter partes application was brought before me on the 14th day of November 2000 when I heard both parties through their Counsel.

The Applications

In the inter partes application, on one hand, the Plaintiff is praying for an injunction, while on the other hand, the Defendant is praying for an order that the application for an injunction be dismissed and/or that the order of injunction of 6th October 2000 be vacated. There are, to this end, affidavits filed by both parties in support of the injunction and was in support of an order vacating the said exp-arte order of injunction. Notwithstanding the differences in the facts set out in the affidavits of each of the parties the facts must be accepted as correct for the purposes of this Ruling.

The gravamen of the Plaintiff's application is that she wants an injunction to issue against the Defendant. It is the Plaintiff's contention that the Defendant is claiming that he bought the property on title No. NY/423 situated in Nyambandwe in the city of Blantyre of the Republic of Malawi. The Plaintiff has further contended that the Defendant blocked the entrance to the house of the estate of the deceased (Julio Mwanamanga Mwitha) on the said title No. NY 423 thereby causing a nuisance and that at the time of blocking the said entrance to the house the Plaintiff was taking over possession from Fincom, who were tenants then, in order to hand it over to a Mr. Zingale who had bought the property from her. To this end it was further argued by the Plaintiff that the Defendant has no claim of right to the property hence this application for an order of injunction against the Defendant who, she has argued, is claiming possession on the strength of an agreement which was executed after she had already concluded a sale agreement with the said Mr. Zingale.

The Defendant, on the other hand, has essentially submitted that the ex-parte order of interlocutory injunction issued on 6th October 2000 was improperly granted because it allowed the said Mr. Zingale to move into the house when the *status quo* which was to be preserved was that the house ought to have remained unoccupied.

It was further contended by learned counsel for the Defendant that no order for an injunction should be granted to the Plaintiff as there will be no *status quo* to preserve since an injunction will only mean that Mr. Zingale will get occupation of the house. The Defendant, through learned counsel, has also submitted that he is entitled to possession of the said house because he bought the property, from an executor of his own wrong, earlier than when the said Mr. Zingale bought same from the Plaintiff. Thus it was urged on the part of the defendant that the Plaintiff's remedy can only be against the estate of Rodgers Mwitha and not the Defendant.

It was observed by this court that during arguments the submissions of both counsel were so detailed and they contained detailed expansion on the evidence of what each of the parties think the court ought to consider in deciding whether or not to grant an injunction. The submissions and the evidence were so detailed so much so that I was left to delve into the mass of information placed before me to try and ascertain the issues to be considered. In fact a better part of counsel's arguments, at the hearing of this summons, were on who has the title to property title No. NY 423, as between the Defendant and the said Mr. Zingale or which sale agreement is valid in respect of the said property on title No. NY 423. I would be reluctant to make any determination on this side issue raised in arguments of counsel because that is not what the summons before me is meant to decide. I am especially reluctant because such an issue can effectively be decided at a full trial of the action commenced by writ and after an exchange of pleadings where parties would give evidence *viva voce*.

Issue for determination

It is my view that the sole issue for determination before me is whether or not an interlocutory injunction should issue against the Defendant. The legal principles to be applied in applications for an interlocutory injunction

are common knowledge and I need not recast them here but it will suffice to put it here that I have read them and will apply them to this case (American Cyanamid Co. - vs- Ethicon Ltd (1975) A.C. 396; (1975) 1 All E.R. 504).

Law and Findings

As I understand it the Plaintiff wants to have an injunction issued against the Defendant on the premise that the Defendant's conduct in blocking the entrance to the property and threatening to occupy the house on the said property amounted to a nuisance and amounts to a nuisance that ought not to be repeated by the Defendant hence the need for an injunction. It must be noted that it is apparent that there has been a change of circumstances since the ex-parte order of injunction of 6th October 2000. The Defendant has argued that the said order of injunction of 6th October 2000 enabled the said Mr. Zingale to enter and occupy the house on title No. 423 the subject matter of this application. The Plaintiff did not dispute this. If this is the position then it means that the Plaintiff is not in actual possession of the house and therefore can not complain of any nuisance caused by the Defendant on the said property and/or trespass by the defendant on the said property. It is trite law that a private nuisance, like trespass, is actionable only at the suit of him who is in possession of the land injuriously affected by it and, further trespass is actionable only at the suit of the man who is in possession of the land.

Now applying this legal principle to the instant case the plaintiff's argument that the defendant has created a nuisance on the property can not be sustained since she is not in actual possession of the property in question in this matter. Whilst it could be said that the Plaintiff had a reversionally interest at the time she was about to get possession from Fincom that is not the case at the moment for she has no proprietary interest in the land except, for what it is worth, the execution of instruments, if there are any to be executed, with the said Mr. Zingale.

It is my judgment that, in view of what I have just demonstrated above, the Plaintiff has failed to show that she has a good arguable claim which she is seeking to protect. It is the trite principle of law that, *inter alia*, in an application for an interlocutory injunction a party seeking an injunction must

demonstrate that she/he has a good arguable claim to the right he/she seeks to protect. In the light of the fact that the Plaintiff is not in actual possession of the property, and that the said Mr. Zingale was not joined as a party to these proceedings, this application for an interlocutory injunction must fail. In my considered opinion it is Mr. Zingale who would have been saying that the defendant's acts would constitute a nuisance at the property worth stopping by way of an interlocutory injunction.

In the event that I am wrong in this finding, that is to say that the Plaintiff has no claim of right worth protecting in this application, I would still dismiss this application on another ground. It is observed that in the writ of summons issued herein the Plaintiff's claim is for an injunction and costs of the action. In particular the Plaintiff's writ of summons was indorsed as follows:

“(i) An injunction restraining the Defendant from occupying and blocking the entrance to the Plaintiff's house known as title No. NY 423 Nyambadwe

(ii) Cost (of) this action.”

It is so clear that the substantive claim, if not the only claim, by the Plaintiff is an injunction. There are no other substantive claims under any law except this claim of an injunction. The question that has exercised my mind so much is whether it will be proper that an interim injunction should issue where the plaintiff's only substantive claim is an injunction itself? The question is settled adversely to the Plaintiff. In my most considered judgment an interim injunction, if granted, will entail that the Plaintiff will have been given the remedy which she will seek at trial if this matter were to proceed to trial. Indeed if it were to be granted in such circumstances, as those prevailing in this case, it is very unlikely that the Plaintiff would proceed with her action since she would have been given the substantive remedy she is praying for in the action she has commenced. I do not think that I will be exercising my discretion properly if I were to order that an injunction should issue since an injunction is meant to be a stop gap measure whilst awaiting a final determination of a case. In the matter before me the dispute that has to be determined at the trial is not there in the writ of summons. As put by learned Counsel for the Defendant there will be no

status quo to be preserved pending trial since an injunction would put to rest the Plaintiff's claim. Indeed it would be safe to conclude that if an injunction were to issue the Plaintiff would not be inclined to pursue her claim since she would have been granted the remedy she is seeking there being no other claim she has against the Defendant. In point of fact the Plaintiff dragged her feet after she was granted an ex-parte order of injunction. She did not expedite the inter-partes application for this injunction. If the Plaintiff's fear is that the Defendant will create a nuisance or that the Defendant will commit trespass on the property then surely the proper party should commence an action claiming damages or other relief in respect of the said trespass or nuisance and it will be that proper party who may apply for an interim injunction whilst waiting for the determination of the action to be so commenced. That proper party is the said Mr. Zingale and not the Plaintiff.

In sum the Plaintiff's application must fail with costs to the Defendant.

Pronounced in Chambers at the Principal Registry this 1st day of December 2000.


F.E. Kapanda
JUDGE